



NIXON & VANDERHYE P.C.
901 NORTH GLEBE ROAD, 11TH FLOOR
ARLINGTON VA 22203

COPY MAILED

MAR. 05 2009

OFFICE OF PETITIONS

In re Application of
Benjamin Arnette LaGrange et al.
Application No. 10/774,400
Filed: February 10, 2004
Attorney Docket Number: **839-1383**

ON PETITION

This is a decision on the petition filed February 5, 2009, under 37 CFR 1.181, to withdraw the holding of abandonment and in the alternative, under 37 CFR 1.137(b)¹, to revive the above identified application.

The petition under 37 CFR 1.181 is **DISMISSED**.
The petition under 37 CFR 1.137(b) is **GRANTED**.

The above-identified application became abandoned as a result of petitioner's failure to file a proper appeal brief within the time period provided. A Notice of Appeal was filed December 6, 2007. On February 5, 2008 an appeal brief was filed. On February 20, 2008, however, a Notification of Non-Compliant Appeal Brief (37 CFR 41.37) was mailed. A replacement appeal brief was filed March 6, 2008 and a Notification of Non-Compliant Appeal Brief (37 CFR 41.37) was again mailed on May 8, 2008. A second

¹Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

replacement appeal brief was filed June 6, 2008 and a Notification of Non-Compliant Appeal Brief (37 CFR 41.37) was again mailed on August 13, 2008. After the filing of yet another replacement appeal brief on September 12, 2008 a Communication Re: Appeal was mailed December 5, 2008 advising that the Appeal is Dismissed because "the corrected Appeal Brief filed September 12, 2008 did not overcome all of the reasons (pertaining to box 4 and box 10, item 4 on the Notice of Non-Compliant Appeal Brief dated August 13, 2008) for noncompliance of which the Appellant was notified. MPEP 1205.02." Thus, since there were no allowed claims the application became abandoned.

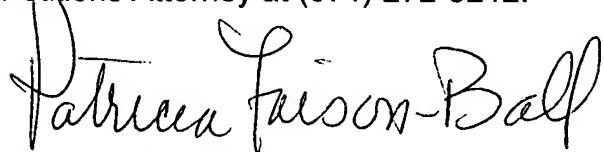
Petitioner argues that the abandonment was erroneous in that they fully complied with the Examiner's requirement and that the abandonment was premature since extensions could have been requested.

The Notice of Defective Appeal Brief mailed August 13, 2008 set a one-month period for reply that was extendable under 37 CFR 1.136. Applicant had until February 13, 2009 in which to file the corrected brief. Applicant filed what they thought was a "corrected" appeal brief on September 12, 2008. The examiner of record however disagreed. Since the appeal was dismissed with no claims allowable, the case was properly abandoned. See also MPEP 1215.04. See also 37 CFR 41.37 (d) which states: (d) If a brief is filed which does not comply with all the requirements of paragraph (c) of this section, appellant will be notified of the reasons for non-compliance and given a time period within which to file an amended brief. If appellant does not file an amended brief within the set time period, or files an amended brief which does not overcome all the reasons for non-compliance stated in the notification, the appeal will stand dismissed.

With respect to the petition to revive, the petition fee in the amount of \$1620.00 has been charged to deposit account no. 14-1140.

All other requirements under 37 CFR 1.137(b) having been met, this matter is being referred to Technology Center 3745 for review of the Amended Appeal Brief filed February 5, 2009.

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions